BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL L. HALL Claimant	)	
VS.	)	
KNOLL BUILDING MAINTENANCE INC. Uninsured Respondent	)	Docket No. **1,056,687**
AND	)	
WORKERS COMPENSATION FUND	)	

ORDER

Claimant requests review of the September 30, 2011 Preliminary Hearing Order entered by Administrative Law Judge Bruce E. Moore.

ISSUES

Claimant alleged he suffered injuries when he fell off a roof while working for respondent. Respondent denied the claim and argued claimant was an independent contractor and not an employee. At the preliminary hearing, the respondent and Workers Compensation Fund (Fund) initially stipulated that the parties were covered by the Workers Compensation Act (Act). But after some testimony was taken, the Administrative Law Judge (ALJ) had an off the record discussion with the parties. When the parties went back on the record, the ALJ noted he had concerns regarding whether respondent had sufficient payroll to be covered by the Act. And the ALJ inquired whether the respondent and Fund wanted to change any of their stipulations. At that point both respondent and Fund withdrew their stipulations that the parties were covered by the Act and made coverage under the Act an issue.

The ALJ determined that the respondent's payroll went to the three sole stockholders and other employees who were all related by blood or marriage. The ALJ further determined that K.A.R. 51-11-16 exceeds or conflicts with the statutory provisions of K.S.A. 44-505. Consequently, the ALJ found:

> Respondent is not subject to the act, as its payroll, exclusive of wages paid to 'member[s] of the employer's family by marriage or consanguinity' did not exceed

> $20,000.00 for the year in which Claimant's injury was sustained. If the act does not apply, this court lacks jurisdiction to adjudicate the merits of the claim.[1]

The ALJ further noted that if the parties were subject to the Act, the evidence established that claimant was an employee of respondent.

Claimant requests review of whether the ALJ erred in finding the parties were not subject to the Act. Claimant argues that K.A.R. 51-11-6 is controlling and provides that all payroll paid by a corporation shall be included in the annual payroll calculation. And because respondent stipulated that its payroll exceeded $20,000, the parties are covered by the Act. Consequently, claimant requests the Board to find the parties are covered by the Act and affirm the ALJ's determination that claimant was respondent's employee.

Respondent and Fund contend that K.A.R. 51-11-6 conflicts with the definition of employer under K.S.A. 44-508 as well as K.S.A. 44-505. Therefore, K.A.R. 51-11-6 contravenes the intent of the Act and was improperly promulgated. Respondent and Fund request the Board affirm the ALJ's Preliminary Hearing Order.

The issue raised on review is whether respondent had a sufficient payroll for the parties to be subject to the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Respondent is a duly authorized corporation under the laws of the State of Kansas and has a payroll in excess of $20,000. All the current employees of respondent are 10 percent or greater stockholders in the corporation and have filed elections with the Division of Workers Compensation not to accept coverage under the Kansas Workers Compensation Act. Consequently, respondent did not have workers compensation insurance on the date of claimant's alleged accident.[2] The Fund stipulated that although respondent is not insolvent, it would not be financially able to pay the claimed benefits requested by claimant.[3]

The respondent is a "family owned" corporation whose stockholders include two brothers, Doug Knoll and Harvey Knoll, Jr, as well as Doug Knoll's son Joey Knoll. Claimant's checks were signed by Mary Knoll as secretary for respondent. The record also

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[1] ALJ Order (Sep. 30, 2011) at 4.

[2] P.H. Trans., Resp. Ex. B.

[3] *Id*. at 9.

indicates that Bethany Knoll, Joey Knoll's wife, was employed as respondent's bookkeeper. And Doug and Harvey Knoll, Jr. are the claimant's wife's uncles.

K.S.A. 44-508(a) provides in pertinent part:

> 'Employer' includes: (1) Any person or body of persons, corporate or unincorporate, . . .

K.S.A. 44-505(a)(2) provides that the Act does not apply to:

> any employment, other than those employments in which the employer is the state, or any department, agency or authority of the state, **wherein the employer had a total gross annual payroll for the preceding calendar year of not more than $20,000 for all employees** and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than $20,000 for all employees, except that **no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll** of such employer for purposes of this subsection. (Emphasis added.)

K.A.R. 51-11-6 states:

> In computing the gross annual payroll for an employer to determine whether they are subject to the workers' compensation act, all payroll paid by that employer to all workers shall be included. The computation shall include all payroll whether or not that payroll is paid to employees in the state of Kansas or outside the state of Kansas.
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> The provision in K.S.A. 44-505 excluding the payroll of workers who are members of the employer's family shall not apply to corporate employers.
>
> A corporate employer's payroll for purposes of determining whether the employer is subject to the workers' compensation act shall be determined by the total amount of payroll paid to all corporate employees even when a corporate employee has elected out of the workers' compensation act pursuant to K.S.A. 44-543.

The ALJ noted that the definition of employer included a body of persons. Because respondent's corporation was comprised of family members (the Knolls) the ALJ concluded the K.S.A. 44-505 statutory exclusion of wages paid to a member of the employer's family by marriage or consanguinity was applicable. The ALJ further determined that the regulation, K.A.R. 51-11-6, contravened the controlling statute, K.S.A. 44-505, and was thus void.

Initially, this Board Member disagrees with the ALJ's conclusion that the regulation conflicts with the statute. It is the intent of the legislature that the workers compensation

act be liberally construed for the purpose of bringing employers and employees within the provisions of the Act.[4] While a corporation may legally be a person, a corporation cannot be said to have any family members by marriage or consanguinity. Consequently, K.A.R. 51-11-6 merely confirms that the marriage and consanguinity exclusion in K.S.A. 44-505(a)(2) is not applicable to corporate employers. And because the respondent stipulated it had a payroll in excess of $20,000, the parties are covered by the Act.

Moreover, neither an ALJ or the Board has the authority to determine that a duly promulgated regulation is void.

There is no question the Director of Workers Compensation may adopt the rules and regulations that are necessary for administering the Workers Compensation Act. The Act provides:

> The director of workers compensation may adopt and promulgate such rules and regulations as the director deems necessary for the purposes of administering and enforcing the provisions of the workers compensation act. . . . All such rules and regulations shall be filed in the office of the secretary of state as provided by article 4 of chapter 77 of the Kansas Statutes Annotated and amendments thereto.[5]

And administrative regulations that are adopted pursuant to statutory authority for the purpose of carrying out the declared legislative policy have the force and effect of law.[6]

> 'Rules or regulations of an administrative agency, to be valid, must be within the statutory authority conferred upon the agency. Those rules or regulations that go beyond the authority authorized, which violate the statute, or are inconsistent with the statutory power of the agency have been found void. Administrative rules and regulations to be valid must be appropriate, reasonable and not inconsistent with the law.' *Pork Motel, Corp. v. Kansas Dept. of Health & Environment*, 234 Kan. 374, Syl. ¶ 1, 673 P.2d 1126 (1983).[7]

Because a regulation has the force and effect of law, such a regulation is as binding on the administrative agency as if it was a statute enacted by the legislature. Consequently, the Board concludes neither the ALJ nor the Board has jurisdiction and authority to determine that a regulation is void.

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[4] K.S.A. 44-501(g).

[5] K.S.A. 44-573.

[6] See K.S.A. 77-425; *Vandever v. Kansas Dept. of Revenue*, 243 Kan. 693, Syl. ¶ 1, 763 P.2d 317 (1988); *Harder v. Kansas Comm'n on Civil Rights*, 225 Kan. 556, Syl. ¶ 1, 592 P.2d 456 (1979).

[7] *State v. Pierce*, 246 Kan. 183, 189, 787 P.2d 1189 (1990).

Administrative agencies are generally required to follow their own regulations and failure to do so results in an unlawful action.[8] Neither the ALJ or the Board are courts established pursuant to Article III of the Kansas Constitution and, consequently, neither has the authority to hold that an Act of the Kansas Legislature is invalid. Administrative tribunals are not courts of proper jurisdiction to decide the validity of laws of the State of Kansas. And again, because a regulation has the force and effect of law, neither the ALJ or the Board has jurisdiction and authority to determine a regulation is invalid.

Claimant alleged an accident on May 20, 2011, when he fell off of a roof. Claimant is requesting medical treatment, temporary total or temporary partial disability benefits, past medical expenses, and prescriptions.

Respondent denied that an employer/employee relationship existed; denied claimant's accidental injury arose out of and in the course of employment; and denied that the alleged accident is the prevailing factor causing claimant's injury, medical condition, disability or impairment.

Claimant was employed with respondent since the latter part of 2010. He testified that all three of the Knoll brothers hired him to do roofing. Claimant is related by marriage to the brothers. There was no employment contract but claimant was paid on an hourly basis. Claimant testified that the Knoll brothers told him when to report to work, the hours he would work and what project he would be working. Hall further testified that he rode with the Knoll brothers to the project and the equipment and tools were provided by the Knoll brothers. The Knoll brothers had the right to fire claimant.

Claimant described his accident:

> We was working over there in Woodston, on Woodston Camp, and they got a tin roof, we were putting on tin, and had all that down and we was getting ready to put on the ridge row. And Joey Knoll, he went up the ladder and just walked the ridge and I had the long ridge in my hand and I didn't feel comfortable doing that, so his dad put up a ladder. So I came up the ladder to Joey, and I handed him the tin and he had the, oh, it's foam that goes in underneath to keep out all the weather, any -- insects or birds or anything, but anyway, he -- I was trying to get them from him, he's supposed to hand them to me, and so I reached out for them and he wasn't giving it, so I went out of my way trying to get them from him, and when I did, I had my one hand, one foot on the ladder, and I don't know, I got really stretched out there and seemed like first, he just -- he didn't go out of his way to get them to me, the last time, and I slipped and fell off.[9]

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[8] *Vandever v. Kansas Dept. of Revenue*, 243 Kan. 693, Syl. ¶ 2, 763 P.2d 317 (1988).

[9] P.H. Trans. at 19-20.

Claimant fell approximately 10-15 to the ground and injured his right shoulder. Doug Knoll was working with claimant at the time of the accident. Harvey Knoll took claimant to Osborne Memorial Hospital's emergency room. X-rays were taken and it was determined that claimant had a right dislocated shoulder. Claimant was transferred to Hays Medical Center where he underwent sedation in order to fix the right shoulder. He was not able to return to work.

The ALJ analyzed the evidence in the following fashion:

> If the act ***did*** apply, the court would have no difficulty finding and concluding that Claimant was an employee of Respondent, and that his accidental injury arose out of and in the course of that employment. In determining whether the relationship between the parties is one of employer-employee or principal and contractor, the court looks to whether Respondent had the right to control Claimant in the performance of his duties. **Evans v. Board of Education of Hays**, **178 Kan. 275, 284 P.2d 1068 (1955)**. Additional considerations include the right to discharge the worker, payment by time rather than completed project, and furnishing of tools and equipment. **McCarty v. Great Bend Board of Education**, **195 Kan. 310, 403 P.2d 956 (1965)**; **Anderson v. Kinsley Sand and Gravel, Inc.**, **221 Kan. 191, 558 P.2d 146 (1976)**; **Wallis v. Secretary of Kansas Dept. Of Human Resources**, **236 Kan. 97, 689 P.2d 787 (1984)**. Here, Respondent paid Claimant by the hour, transported him to and from the job site, provided his tools and equipment, supervised his work and had the right to terminate him.

This Board Member agrees and affirms the ALJ's alternative findings that claimant was respondent's employee and suffered accidental injury arising out of and in the course of his employment. But the claim must be remanded to the ALJ to address the remaining issues, if necessary, regarding claimant's entitlement to temporary total or partial disability as well as medical treatment.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[11]

WHEREFORE, it is the finding of this Board Member that the Preliminary Hearing Order of Administrative Law Judge Bruce E. Moore dated September 30, 2011, is reversed in part to find the parties are covered by the Act, affirmed in part to find claimant was

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[10] K.S.A. 44-534a.

[11] K.S.A. 2010 Supp. 44-555c(k).

respondent's employee and suffered accidental injury arising out of and in the course of his employment, and remanded to determine the remaining issues.

IT IS SO ORDERED.

Dated this _____ day of November, 2011.

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HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Mitchell W. Rice, Attorney for Claimant
Jeffrey E. King, Attorney for Respondent
John C. Nodgaard, Attorney for WC Fund
Bruce E. Moore, Administrative Law Judge